RECENT AMERICAN DECISIONS.

Supreme Court of Pennsylvania.

JAMES C. VAN DYKE ET AL. v. ELIZABETH VAN DYKE ET AL.

Although a will may be ineffectual to pass land in another state, because not attested by subscribing witnesses, yet an heir at law to whom a legacy is given from the testator's Pennsylvania estate, the will being valid in this state, will be put to his election, and will not be permitted to claim the gift without giving assent to everything contained in the instrument.

The English rule that cases in which a legacy is given by an unattested will upon the *express* condition that the legatee shall give up his claim to real estate devised away from him, are to be distinguished from those in which such a condition is clearly *implied*, rests upon no sufficient reason, and cannot be satisfactorily explained. The clear intention of a testator should not be frustrated upon authorities establishing a distinction without any difference.

The doctrine of equitable election is grounded upon the ascertained intention of the testator, and the court can resort to every part of the will to arrive at it, in construing a bequest within its rightful jurisdiction.

Equitable election rests upon the principle of compensation; and not of forfeiture, which applies only to the non-performance of an express condition.

Courts of equity in Pennsylvania have jurisdiction in cases of election on the ground of *trust;* although the case arises under a will, and bears incidentally upon the settlement of a decedent's estate. The jurisdiction of the Orphans' Court is concurrent, but not exclusive.

ON appeal in equity from a decree of the Court of Nisi Prius.

Dr. Frederick A. Van Dyke, a citizen of Pennsylvania, domiciled in Philadelphia, died, leaving a will which was duly admitted to probate in Philadelphia.

The decedent was owner of personal estate, and of real estate in Pennsylvania and also in New Jersey.

By his will he gave to his daughters legacies to be paid from his estate in Pennsylvania (which nearly exhausted it), and devised the residue of his Pennsylvania estate, and his lands in New Jersey (particularly describing them), to his sons, in equal shares.

The will, having no subscribing witness, was ineffectual to pass lands in New Jersey, and as to the testator's real estate there, he died intestate, and his daughters take in equal shares with his sons.

This was a bill filed on behalf of the sons, alleging that the testator meant to exclude all but his sons from his New Jersey property; and that he intended that his daughters should take no more than the legacies he had bequeathed to them. The prayer

was that they might be put to their election, either to give effect to the whole will by relinquishing their claim to the New Jersey property; or, from their legacies, to compensate the sons for their loss in consequence of the daughters sharing with them the New Jersey property.

No issue of fact was raised by the answers, and the question which came before the court was simply whether the legatees were bound to elect.

E. Coppèe Mitchell and *Edward Olmsted*, for appellants.

C. E. Morgan and *William A. Porter*, for appellees.

The opinion of the court was delivered by

SHARSWOOD, J.—No question has been made *by the parties* as to the jurisdiction of a court of equity in this state to give the relief prayed for in this bill. It having been suggested that it would be an encroachment upon that which by the Acts of Assembly is exclusively conferred upon the Orphans' Court, the attention of the counsel was directed to this point when the cause was ordered for reargument. The learned and able gentlemen retained for the defendants have, however, frankly conceded it. Consent, indeed, cannot give jurisdiction, and it is therefore deemed proper to say that we entertain no doubt upon the subject. The Orphans' Court, by the Act of June 16th 1836, § 19, Pamph. L. 792, has jurisdiction of proceedings for the recovery of legacies —of the settlement of the accounts of executors—the distribution of the estates of decedents—and in all cases wherein executors may be possessed of or in any way accountable for any real or personal estate of a decedent. It is also the settled doctrine that the jurisdiction of that court within its appointed orbit is exclusive: *Whiteside* v. *Whiteside*, 8 Harris 473; *Shollenberger's Appeal*, 9 Harris 337; *Black* v. *Black*, 10 Casey 354; and, no doubt, a court of equity cannot interfere with a matter of which the Orphans' Court has exclusive jurisdiction: *Loomis* v. *Loomis*, 3 Casey 233; *Biddle* v. *Bickley*, 9 Casey 276. But it is not in every case which may incidentally bear upon the settlement of the estate of a decedent that its jurisdiction is exclusive; otherwise all remedies for the recovery of claims against such estate would necessarily be drawn within its vortex. This has never been pretended: *McLean's Executors* v. *Wade*, 3 P. F. Smith 145; *Sergeant's Executors* v. *Ewing*, 6

Casey 75. This is not a proceeding to recover a legacy charged on land, nor to compel a settlement or distribution, but falls within the admitted scope of the authority of a court of equity in cases of trust. The legal title being in the defendants as heirs at law, that court, if it is a case of election, holds them bound, as trustees, to compensate the devisees disappointed of the bounty intended for them by the testator. The jurisdiction in such a case is expressly recognised as concurrent in *Lewis* v. *Lewis*, 1 Harris 79. The decree of this court will doubtless be conclusive as to the subject-matter upon the final settlement of the accounts of the executors, but so would a judgment against them in a court of law, if no fraud or collusion were shown. We pass therefore to the main question.

It may certainly be considered as settled in England, that if a will purporting to devise real estate, but ineffectually because not attested according to the Statute of Frauds, gives a legacy to the heir at law, he cannot be put to his election: *Hearle* v. *Greenbank*, 3 Atk. 695; *Thellusson* v. *Woodford*, 13 Ves. 209; *Buckridge* v. *Ingram*, 2 Ves. Jr. 652; *Sheddon* v. *Goodrich*, 8 Ves. 482. These cases have been recognised and followed in this country: *Melchor* v. *Burger*, 1 Dev. & Batt. Eq. 634; *McElfresh* v. *Schley*, 1 Gill. 181; *Jones* v. *Jones*, 8 Id. 197; *Kearney* v. *McComb*, 1 C. E. Green 189. Yet it is equally well established that if the testator annexes an express condition to the bequest of the personalty, the duty of election will be enforced: *Boughton* v. *Boughton*, 2 Ves. 12; *Whistler* v. *Webster*, 2 Ves. Jr. 652; *Ker* v. *Wauchope*, 1 Bligh 1; *McElfresh* v. *Schley*, 1 Gill 181. That this distinction rests upon no sufficient reason has been admitted by almost every judge before whom the question has arisen. Why an express condition should prevail, and one however clearly implied should not, has never been and cannot be satisfactorily explained. It is said that a disposition absolutely void is no disposition at all, and being incapable of effect as such, it cannot be read to ascertain the intent of the testator. But an express condition annexed to the bequest of the personalty does not make the disposition of the realty valid: it would be a repeal of the Statute of Frauds so to hold. How then can it operate any more than an implied condition to open the eyes of the court so as to enable them to read those parts of the will which relate to the realty—and without a knowledge of what they are, how can

the condition be enforced? "As to the question of the election," said Lord KENYON, while Master of the Rolls, "the cases which have been cited are certainly great authorities; but I must confess I should have great difficulty in making the same distinctions if they had come before me. They have said you shall not look into a will unattested so as to raise the condition which would be implied from the devise if it had appeared; but if you give a legacy on condition that the legatee shall give the lands, then he must elect. However, I am bound by the force of authorities to take no notice whatever of the unattested will, as far as relates to the freehold estate:" *Carey* v. *Askew*, 1 Cox 241. "I do not understand," said Sir WILLIAM GRANT, "why a will, though not executed so as to pass real estate, should not be read for the purpose of discovering in it an implied condition concerning real estate annexed to a gift of personal property; as it is admitted it must be read when such condition is expressly annexed to such gift. For if, by a sound construction, such condition is rightly inferred from the whole instrument, the effect seems to be the same as if it was expressed in words:" *Brodie* v. *Barry*, 2 Ves. & Bea. 127. So Lord ELDON declared that "the distinctions upon this head of law appear to be rather unsubstantial," and that "these are undoubtedly thin distinctions, and a judge having to deal with them, finds a difficulty in stating to his own mind satisfactory principles on which they may be grounded:" *Ker* v. *Wauchope*, 1 Bligh 1. And in another place: "The reason of that distinction, if it was *res integra*, is questionable." "With Lord KENYON, I think the distinction such as the mind cannot well fasten upon:" *Sheddon* v. *Goodrich*, 8 Ves. 482.

Mr. Justice KENNEDY has expressed the same opinion. "When a condition is necessarily implied by a construction in regard to which there can be but one opinion, there can be no good reason why the result or decision of the court should not be the same as in the case of an express condition, and the donee bound to make an election in the one case as well as the other:" *City of Philadelphia* v. *Davis*, 1 Whart. 510.

There is another class of cases in England wholly irreconcilable with this shadowy distinction; for the heir at law of a copyhold was formerly put to his election, though there had been no surrender to the uses of the will. This was previous to 55 Geo. III. c. 192: 1 White & Tudor's Leading Cas. 239 note. Yet as

Sir WILLIAM GRANT has remarked: "A will, however executed, was as inoperative for the conveyance of copyhold, as a will defectively executed is for the conveyance of freehold estate:" *Brodie* v. *Barry*, 2 Ves. & B. 130.

The mind instinctively shrinks from the task of frustrating the clear intention of a testator, aiming, too, to make all his children equal, upon authorities establishing a distinction without any difference. The precise point can never arise in this state, for happily our Statute of Wills of April 8th 1833, Pamph. L. 249, wisely provides that the forms and solemnities of execution and proof shall be the same in all wills, whether of realty or personalty. The case before us is of a will duly executed according to the law of Pennsylvania, devising lands in New Jersey, where, however, it is invalid as to the realty by not having two subscribing witnesses. A court of New Jersey might hold themselves on these authorities bound to shut their eyes on the devise of the realty, and consider it as though it were not written. And so they have held: *Kearney* v. *Macomb*, 1 C. E. Green 189. They might feel themselves compelled to say, with Lord ALVANLEY, however absurdly it sounds: "I cannot read the will without the word 'real' in it; but I can say, for the statute enables me, and I am bound to say, that if a man, by a will unattested, gives both real and personal estate, he never meant to give the real estate:" *Buckridge* v. *Ingram*, 2 Ves. Jr. 652. But a statute of New Jersey has no such moral power over the conscience of a court of Pennsylvania to prevent it from reading the whole will upon the construction of a bequest of personalty within its rightful jurisdiction. If a question could arise directly upon the title of the heirs at law to the New Jersey land, doubtless the courts of any other state, upon the well-settled principles of the comity of nations, must decide it according to the *lex rei sitæ*. We are dealing only with the bequest of personalty, and the simple question is, whether the testator intended to annex a condition. If, without making any disposition whatever of the New Jersey estates—dying intestate as to them—he had annexed an express proviso to the legacies to his daughters that they should release to their brothers all their right and title as heirs at law to these lands,—it is of course indubitable that such a condition would have been effectual. We are precluded by no statute to which we owe obedience from

reading the whole will, and, if we see plainly that such was the intention of the testator, from carrying it into effect.

Some cases have arisen in England upon wills disposing of English and Scotch estates, in which the judgments have not been harmonious, nor can any general principle be extracted from them bearing upon this question. In *Brodie* v. *Barry*, 2 Ves. & Bea. 127, an heir at law of heritable property in Scotland, being also a legatee under a will not conforming to the law of Scotland as to heritable property, was put to his election. By that law, a previous conveyance by deed was necessary, according to the proper feudal forms, upon which the uses declared by the will might operate. As by the law of Scotland the heir at law in such a case was put to his approbate or reprobate (the Scotch law term for election), and it was very similar to a will of copyhold, Sir WILLIAM GRANT, considering the law of both countries to be the same, felt himself freed from the necessity of determining by which law the decision should be made. *Dundas* v. *Dundas*, 2 Dow & Clark 349, was a case in the House of Lords from Scotland. The will was formal, according to the Scotch law, but was invalid as to real estate in England, under the Statute of Frauds. Yet the decision of the Court of Session putting the English heir at law to his approbate or reprobate, was affirmed. This case is certainly in point in favor of the position taken in this opinion. It is true, that in the judgment pronounced by Lord Chancellor BROUGHAM—then but recently raised to the woolsack—it is not put on that ground. He assumes that in England, while a court of law would be precluded by the statute from looking at the disposition made of the realty, it was competent for a court of equity to do so; and that the Court of Session in Scotland had only done what a chancellor in England had a right to do; a distinction, it must be allowed, not doubted in any of the previous cases, which were all in courts of equity.

In *McCall* v. *McCall*, Drury 283, Lord Chancellor SUGDEN held that an heir at law of heritable property in Scotland, who was also the devisee of real estate in Ireland, under a will duly executed as to the Irish, but ineffectual as to the Scotch estate, was bound to make his election. In the late case of *Maxwell* v. *Maxwell*, 13 Eng. L. & Eq. Rep. 443, which arose in England, the heir at law in Scotland was not put to his election, but distinctly on the ground that the will, in the alleged disposition of

the Scotch estate, had used only general words. "If the will had mentioned Scotland in terms," said Sir KNIGHT BRUCE, Lord Justice, "or the testator had not any real estate, except real estate in Scotland, that might have been a ground for putting the heir to his election. The matter, however, standing as it does, we are bound to hold that the will does not exhibit an intention to give or affect any property which it is not adapted to pass." And Lord CRANWORTH concurred in this view.

In this state of the authorities, we are clear in holding that we are not precluded by force of the New Jersey Statute of Frauds from reading the whole will of the testator in order to ascertain his intention in reference to the bequests of personalty now in question. We are equally clear that it is a case of election. The intention of the testator does not rest merely upon the implication arising from his careful division of his property among his children in different classes, but he has indicated it in words by the clause, "I direct and enjoin on my heirs that no exception be taken to this my will or any part thereof on any legal or technical account." It is true that for want of a bequest over, this provision would be regarded as *in terrorem* only, and would not induce a forfeiture: *Chew's Appeal*, 9 Wright 228. But, as has been often said, the equitable doctrine of election is grounded upon the ascertained intention of the testator, and we can resort to every part of the will to arrive at it. "The intention of the donor or testator ought doubtless to be the polar star in such cases," says Mr. Justice KENNEDY, "and whenever it appears from the instrument itself conferring the benefit, with certainty that will admit of no doubt, either by express declaration or words that are susceptible of no other meaning, that it was the intention of the donor or testator that the object of his bounty should not participate in it without giving his assent to everything contained in the instrument, the donee ought not to be permitted to claim the gift, unless he will abide by the intention and wishes of its author:" *City of Philadelphia* v. *Davis*, 1 Whart. 510.

This, however, is not the only mode in which the equity of the case can be reached. The doctrine of equitable election rests upon the principle of compensation; and not of forfeiture, which applies only to the non-performance of an express condition: 2 Madd. Ch. 49. Besides, no decree of this court could authorize the guardians of the minors to execute releases of their right and

title to the New Jersey land which would be effectual in that state. The alternative decree prayed for in the bill is that which is most appropriate to the case.

Decree reversed; and decree entered that the executors of F. A. Van Dyke, deceased, shall pay to the defendants such sum less than the amount of their respective legacies as will compensate the plaintiffs for the value of the shares of the said legatees in the said real estate in New Jersey; and that it be referred to a master to settle and report such respective amounts.

The English Statute of Frauds required that a will of lands should be executed in the presence of three subscribing witnesses, or else "be utterly void and of none effect." In construing this statute, the courts have laid down two principles, which seem to be almost identical, but yet are susceptible of very widely different application.

1. That, since every man is presumed to know the law, where a testator devised lands by a will not executed and attested as required by the statute, *he never intended* to have the devise take effect: *Buckridge* v. *Ingram*, 2 Ves. 652.
2. That, since the law required a devise of lands to be proved by evidence of a certain character and solemnity, the courts were precluded from taking notice of the devise unless the proper evidence of it were produced. Or, in other words, they *could not read* the will: *Thelluson* v. *Woodford*, 13 Ves. Jr. 209.

The first of these principles is founded on a maxim which is not true in fact, and which, in cases of wills, is not brought into operation. The rules of construction applied to wills are much less strict than those applied to deeds, because testators are frequently *inopes consilii*, and ignorant of the law, and this has been so from a very early period. Executory devises have been supported, where as remainders they would have fallen; and words are sufficient to pass an estate of inheritance, if used in a will, which, if found in a deed, would create only a life estate. Certainly, then, nothing could be more absurd than, upon the strength of such a maxim, to say that a testator did not mean what he has solemnly and clearly expressed in writing as the last act of his life, because he has omitted to have the required number of witnesses who subscribed their names as such, or some other technical and formal requisite.

2. The second principle above mentioned reduces the matter to a question of *evidence*. Where the will is so executed and attested as to be properly received and read in evidence before the court, it has never been doubted that those who receive benefits thereby will be held to give effect to every part thereof. Now, a writing could have been received in evidence by the court when considering a contract or a bequest relating to personalty, which was not sufficient evidence to affect real estate under the statute: and, once in evidence, every part of it might certainly be looked at in arriving at the intention of the framer of it as to the matter in hand, *i. e.* the personal property.

The anomaly in the English law, which has been followed in this country, and which is exposed and overruled in the foregoing decision, was introduced by Lord HARDWICKE in 1749, in *Hearl* v. *Greenbank*, 1 Ves. Sr. 298, where he seems to have been led away

by the very strong and positive words of the statute, "utterly void and of none effect," and to have given his decision of the point without fully examining, and certainly without fully stating, the reasons upon which he grounded it. In the following year, 1750, the same chancellor decided the case of *Boughton* v. *Boughton*, 2 Ves. Sr. 12, which was also a question of election arising upon a will not sufficiently attested, and there he undertook to give the reasons for his judgment in *Hearl* v. *Greenbank;* and drew the distinction between an express condition that those claiming benefit by the will should suffer the whole of it to take effect, and a similar condition implied from the evident intention of the testator. "If there is such a condition (express) annexed to a personal legacy, the court must consider every part of that, whether it is a matter relating to real estate or not. You must read the whole will relating to the personal legacy, let it relate to what it will; which is a substantial difference, and will prevent going too far to break in upon the Statute of Frauds, and at the same time will attain natural justice, which requires, as far as may be, such a construction to be made, otherwise the intent of the testator may be overturned."

It is to be regretted that the laws of evidence in states bordering upon each other should be so widely different as to give rise to cases like *Van Dyke* v. *Van Dyke*. The statute of New Jersey requires *two* subscribing witnesses to a will—that of Maryland *three*—and in the intermediate state of Pennsylvania a will is good without any subscribing witness at all. E. C. M.

United States District Court. District of New Jersey. In Admiralty.

ALONZO JACKSON ET AL., LIBELLANTS, *v.* STEAM PROPELLER KINNIE.

State statutes authorizing actions *in rem* against vessels for causes cognisable in admiralty are statutes conferring admiralty jurisdiction, and are therefore unconstitutional.

A lien created by a state law against a domestic vessel for supplies furnished in a home port cannot be recognised or enforced in a court of admiralty.

THIS was a libel for seamen's wages. The Hoboken Coal Company, intervening for their own interest, contested the libellants' demands, and claimed to have a lien upon the vessel for supplies furnished. A reference was made to a commissioner to hear the proofs and allegations of the parties.

Hamilton and *Wallis*, for libellants.

Jonathan Dixon, Jr., for intervenors.

FIELD, D. J.—It is insisted by the libellants that the Hoboken Coal Company have no standing in court, that they have no lien upon this vessel which a court of admiralty will recognise or enforce, and that consequently they have no right to intervene for their own interest, or to contest the claims of the libellants.

It is admitted that the propeller was owned in this state, that the intervenors were a corporation organized and carrying on business in this state, and that the supplies were furnished in this state. It is a case then of a domestic vessel, and supplies furnished in a home port. By the maritime law of continental Europe, no distinction is made between the cases of domestic and foreign ships, nor between supplies furnished in a home port and abroad. But by the maritime law of England and of this country, supplies furnished to a domestic vessel, in a home port, are presumed to be furnished on the personal credit of the owner or master, and do not create a lien, which can be enforced in a court of admiralty by proceedings *in rem*.

But the intervenors claim to have a lien upon this vessel, in virtue of an Act of the Legislature of New Jersey, approved March 20th 1857. The title of the act is, "An act for the collection of demands against ships, steamboats, and other vessels:" 4 Nixon's Dig. 576. The act, with the supplement thereto, approved March 18th 1858, provides that, "Whenever a debt amounting to $50 or upwards shall be contracted by the master, owner, agent, or consignees of any ship or vessel within this state, for either of the following purposes, namely, on account of any work done, or materials or articles furnished in this state, for or towards the building, repairing, fitting, furnishing, or equipping such ship or vessel, or for wharfage and the expenses of keeping such vessel in port, including the expense incurred in employing persons to watch her, such debt shall be a lien upon such ship or vessel, her tackle, apparel, and furniture, and shall be preferred to all other liens thereon, except mariners' wages." The act then proceeds to make provision for enforcing this lien. Application may be made to a Supreme Court commissioner for a warrant, to be directed to the sheriff, or a constable, or in their absence, to any coroner of the county, commanding him to attach, seize, and safely keep said ship or vessel to answer such lien. Notice of the issuing of the warrant is to be published in a newspaper printed in the county, and unless the lien is satisfied, or

the warrant discharged, the ship or vessel is to be sold, and the proceeds to be distributed in the manner directed by the act.

Is this Act of the Legislature of New Jersey, so far as it authorizes proceedings *in rem* against a ship or vessel, in violation of the Constitution of the United States; and is the lien thereby attempted to be created one which a court of admiralty will recognise or enforce? The Constitution declares, in the 2d section of the 3d article, among other things, that the judicial power of the United States shall extend "to all cases of admiralty and maritime jurisdiction." And the 9th section of the Judiciary Act of 1789 provides that the District Courts of the United States shall have exclusive original jurisdiction of all civil causes of admiralty and maritime jurisdiction; saving to suitors, in all cases, the right of a common-law remedy, where the common law is competent to give it. It will be seen, therefore, that the jurisdiction of the District Courts of the United States, over all admiralty and maritime causes, is exclusive, with the exception of such concurrent remedy as is given by the common law.

There is eminent wisdom and propriety in giving to the courts of the United States exclusive jurisdiction in such cases. "The most bigoted idolizers of state authority," said the Federalist, "have not thus far shown a disposition to deny the national judiciary the cognisance of maritime causes. These so generally depend on the law of nations, and so commonly affect the rights of foreigners, that they fall within the considerations which are relative to the public peace:" The Federalist, No. 80.

"The admiralty jurisdiction," says Judge STORY, "naturally connects itself, on the one hand, with our diplomatic relations and duties to foreign nations and their subjects; and, on the other hand, with the great interests of navigation and commerce, foreign and domestic. There is, then, a peculiar wisdom in giving to the National Government a jurisdiction of this sort, which cannot be wielded except for the general good, and which multiplies the securities for the public peace abroad, and gives to commerce and navigation the most encouraging support at home:" 3 Story Com. 533.

That these cases, intended to be provided for by the act under consideration, are *maritime contracts*, and therefore "civil causes of admiralty and maritime jurisdiction," there can be no doubt: *De Lovio* v. *Boit*, 2 Gall. R. 474; Dunlap's Admiralty Pr. 43.

They are therefore within the exclusive jurisdiction of the District Courts of the United States.

This question has been repeatedly decided by the Supreme Court of the United States. Statutes, similar in every respect to that of New Jersey, have been enacted in most of the states; and whenever they have come under the consideration of the Supreme Court they have been held to be unconstitutional and void, so far at least as they authorize proceedings *in rem*. Thus, in the case of *The Moses Taylor*, 4 Wallace 411, it was held that a statute of California, which authorizes actions *in rem* against vessels for causes of action cognisable in admiralty, to that extent attempts to invest her courts with admiralty jurisdiction, and is therefore unconstitutional. "The action against the steamer by name," say the court, "authorized by the statute of California, is a proceeding in the nature and with the incidents of a suit in admiralty. The distinguishing and characteristic feature of such suit is that the vessel or thing proceeded against is itself seized and impleaded as the defendant, and is judged and sentenced accordingly. It is this dominion of the suit in admiralty over the vessel or thing itself which gives to the title made under its decrees validity against all the world." And in the case of *The Hine* v. *Trevor*, 4 Wallace 555, where a similar statute of Iowa was under consideration, the court held that state statutes, which attempt to confer upon state courts a remedy for marine torts and marine contracts by proceedings strictly *in rem*, are void. In this case it was contended that the statute of Iowa might fairly be construed as coming within the clause of the 9th section of the Judiciary Act, which "saves to suitors, in all cases, the right of a common-law remedy, where the common law is competent to give it." But the court say the remedy prescribed by the statute is in no sense a common-law remedy. It is a remedy partaking of all the essential features of an admiralty proceeding *in rem*. The statute provides that the vessel may be sued and made defendant without any proceeding against the owners, or even mentioning their names. And while the proceeding differs thus from a common-law remedy, it is also essentially different from what are called suits by attachment. In these cases there is a suit against a personal defendant by name, but because of inability to serve process on him, on account of non-residence or some other reason, the suit is commenced by a writ, directing the proper officer to

attach sufficient property of the defendant to answer any judgment which may be rendered against him.

But, besides these decisions of the Supreme Court of the United States, we have a recent decision of the Court of Appeals of New York, in a case involving the constitutionality of a statute of that state, precisely similar to our own, from which in fact our statute was copied. It is the case of *Bird et al.* v. *The Steamboat Josephine*. It has not yet been officially reported, but it was published in the New York Transcript of November 5th 1868. The court decided that the proceeding authorized by their statute against a vessel by name was a proceeding in the nature, and with all the incidents, of a suit in admiralty; that such a proceeding could not be sustained; and that the statute itself was unconstitutional.

It is pleasant to find this concert and harmony of opinion between the Court of Appeals of the state of New York and the Supreme Court of the United States, upon a question of conflicting jurisdiction between state and Federal courts.

But it is insisted, that although the statute of New Jersey may be unconstitutional, so far as it authorizes proceedings *in rem* against a ship or vessel for a breach of maritime contract, yet it nevertheless creates a lien upon such vessel, which a Court of Admiralty will recognise and enforce. There was a time when such an argument might have been successfully urged. The effect of such statutes undoubtedly is, to assimilate our law to that of continental Europe, or, in the language of Chief Justice WATKINS, in *Merrick* v. *Avery*, 14 Ark. 378, "to extend the privilege of the maritime lien upon sea-going vessels for their building or equipment in domestic ports, just as that lien existed in Europe, and would have prevailed in England, and so descended to this country, but for the jealousy of the common law." And it is undoubtedly true, that, for many years, the Supreme Court of the United States, by repeated decisions, held, that these liens thus created by local law might be enforced by proceedings *in rem* in the District Court; and that in 1844 they adopted a rule, expressly authorizing the process *in rem* where the party was entitled to a lien under the local or state law. But it is equally true that this rule has since been abrogated, and that such liens can no longer be enforced by proceedings *in rem* in the District Court.

Chief Justice TANEY, in delivering the opinion of the Supreme Court in the case of *The Steamer St. Lawrence*, 1 Black 522, gave a brief but lucid history of the legislation of Congress upon this subject, of the course of decisions by the Supreme Court, and of the reasons which led to the adoption of the 12th rule, in the first instance, and its subsequent repeal.

After the passage of the Judiciary Act of 1789, Congress passed the act prescribing the process to be used in the different courts it had established; and by that act directed that, in the courts of admiralty and maritime jurisdiction, the forms and modes of proceedings should be according to the course of the civil law. This act left no discretionary power in the Admiralty Courts, or in the Supreme Court, in relation to the modes and forms of proceeding. But this difficulty was soon seen and removed, and by the Act of May 8th 1792, these forms and modes of proceeding are to be according to the principles, rules, and usages which belong to courts of admiralty, as contradistinguished from courts of common law; and are made subject to such alterations and additions as the respective courts might deem expedient, "or to such regulations as the Supreme Court of the United States shall think proper from time to time by rule to prescribe to any Circuit or District Court concerning the same." And the power here conferred upon the Supreme Court was afterwards enlarged by the Act of August 23d 1842. It was under the authority of these two acts that the 12th rule, to which we have referred, was made in 1844, and afterwards altered by the rule adopted in December 1858. In the mean time, by a series of decisions in the Supreme Court, it had been held, that where liens had been given by the local law, the party was entitled to proceed *in rem* in the Admiralty Court to enforce it: *The General Smith*, 4 Wheat. 438; *Peyrouse* v. *Howard*, 7 Pet. 324; *The New Orleans* v. *Phœbus*, 11 Id. 175. When the rules, then, were framed in 1844, in conformity to the practice thus adopted, it was provided by the 12th rule, that, "In all suits by material-men for supplies or repairs or other necessaries for a foreign ship, or for a ship in a foreign port, the libellant may proceed against the ship and freight *in rem*, or against the master, or the owner alone, *in personam;* and the like proceedings *in rem* shall apply to cases of domestic ships, where, *by the local law*, a lien is given to material-men for supplies, repairs, or other necessaries." Now, there

would have been no embarrassing difficulties in thus using the ordinary process, *in rem*, of the civil law, if the state law had given the lien in general terms, without specific conditions or limitations inconsistent with the rules and principles which governed implied maritime liens. On the contrary, such process would have promoted the convenience and facilities of trade and navigation by the promptness of its proceedings, and would have disposed at once of the whole controversy, without subjecting the party to the costs and delay of a proceeding in the chancery or common-law courts of the state to obtain the benefit of his lien.

In many of the states, however, it was soon discovered that these laws, by which liens were thus created, did not harmonize with the principles and rules of the maritime code. Certain conditions and limitations were annexed to them; and these conditions and limitations differed in different states; and it became manifest that if the process *in rem* was to be used wherever the local law gave the lien, it would subject the Admiralty Court to the necessity of examining and expounding the varying laws of every state, and of carrying them into execution, and that, too, in controversies where the existence of the lien was denied, and the right depended altogether on a disputed construction of a state statute, or, indeed, in some cases of conflicting claims, under statutes of different states, when the vessel had formerly belonged to the port of another state, and had become subject to a lien by the state law. Such duties and powers are appropriate to the courts of the state which created the lien, but are entirely alien to the purposes for which the admiralty power was created, and form no part of the code of laws which it was designed to administer.

The proceeding, therefore, *in rem*, upon the ground that the local law gave the lien where none was given by the maritime code, was found upon experience to be inapplicable to our own mixed form of government. It was found to be inconvenient in most cases and absolutely impracticable in others; and the rule which sanctioned it was therefore repealed. The repealing rule provides that, "In all suits by material-men for supplies or repairs or other necessaries for a foreign ship, or for a ship in a foreign port, the libellant may proceed against the ship and freight *in rem*, or against the master or owner alone *in personam*. And the

like proceedings *in personam*, but not *in rem*, shall apply to cases of domestic ships for supplies, repairs, or other necessaries."

The consequence is, that in cases of domestic ships, for supplies furnished at a home port, a lien created by a state law is one which a court of admiralty can neither recognise nor enforce.

Hence it follows, that in this case, The Hoboken Coal Company have no standing in court, have no right to intervene, either for their own interest or to contest the claims of the libellants, and that the testimony taken on their behalf must be stricken out. Let judgment be entered in favor of the libellants, with costs as against the intervenors.

Supreme Court of Tennessee.

R. A. GRAHAM *v.* MERRILL ET AL.

When the United States forces, during the late war, acquired firm occupation of part of an insurrectionary state, the citizens of that part so occupied were restored to their relations as citizens of the United States, and contracts between them and other citizens became valid.

The Act of July 13th 1861, and the Proclamation of the President of August 16th 1861, authorized, 1. Unrestricted commercial intercourse between the citizens of loyal states and of those parts of insurgent states in occupation of the Federal forces; and 2. Intercourse between citizens of the loyal and insurgent states, subject to the license of the President and the regulations prescribed by the Secretary of the Treasury; and the President's order of February 28th 1862 was a general license to such intercourse. But by the President's Proclamation of March 31st 1863, the distinction was abolished, and all intercourse between the citizens of loyal and insurgent states was made subject to license by the President and the regulations of the Secretary of the Treasury.

It was not necessary to the lawfulness of such intercourse that the party engaging in it should have a special license to himself by name under the President's own sign manual. The President's power to license might be delegated or might be exercised by a general proclamation, such as those of February 28th 1862 and March 31st 1863.

APPEAL from decree of the Chancellor overruling demurrer to complaint.

On May 24th 1864, Graham, a citizen of New York, on the one side, and Merrill and Cliffe, citizens of Williamson county, Tennessee, on the other, entered into articles of partnership to

engage in the business of buying and selling cotton. The place where the partners contemplated and agreed to buy cotton, was in that portion of the state of Tennessee within the military lines of and held in firm occupation by the national army. Cotton so bought, the articles stipulated, should be sent to and sold in the city of New York. At the time of making the contract, Graham had a license or permit from "the proper officer of the Government of the United States" to engage in the contemplated trade, and so informed Merrill and Cliffe. It was contemplated and agreed that the trade should be carried on "in strict conformity with the laws and regulations of the United States, regulating commercial intercourse" between the loyal and insurrectionary states. Graham furnished Merrill and Cliffe with large sums of money, and they bought and shipped to him much cotton, the proceeds of sales of which fell largely short of the money furnished.

The articles stipulated that each party was to have one-half the net profits, and to bear one-half the losses.

This was a bill for an account and contribution.

H. G. SMITH, J.—At the time of the making of the contract, the enemy relation did not subsist between the parties; and, therefore, they had the capacity to contract together, and their contract is not void by reason of enemy relation.

The national army had firm occupation of the country of the residence of Merrill and Cliffe. Such occupation established the dominion and government of the United States over that country, and restored the inhabitants to the relation of citizens of the United States. The previous enemy relation between the parties to the contract was thus ended, and their incapacity to contract with each other, by reason of their previous enemy relation, was also ended: *The Venice*, 2 Wall. 277; *The Ouachita Cotton*, 6 Id. 531.

It is another question, whether the subject-matter of the contract was lawful; a contract for commercial intercourse between a loyal state and a part of an insurrectionary state. If such trade was unlawful the contract was illegal and void. Generally, commercial intercourse between the loyal and disloyal states during the war of the Rebellion was unlawful. It was so made by the Act of Congress of July 13th 1861 (12 St. at Large 251),

and by the several proclamations of the President in conformity with the act, and also probably by the laws of war. But though generally prohibited as to all the insurrectionary states, exceptions were authorized by the Act of Congress and the proclamations of the President. Under the proclamations of August 16th 1861 (12 Statutes at Large 1262), unrestricted trade was authorized between the loyal states and such parts of the insurrectionary states as "from time to time should be occupied and controlled by the national forces engaged in the dispersion of the insurgents." Trade, also, was authorized between the loyal states and the disloyal states, by virtue of license granted by the President, and through and under regulations and restrictions prescribed by the Secretary of the Treasury and approved by the President. Such license was granted by the President, by order of date February 28th 1862, which recites: "Considering that the existing circumstances of the country allow a partial restoration of commercial intercourse between the inhabitants of those parts of the United States heretofore declared to be in insurrection, and the citizens of the loyal states of the Union, and exercising the authority and discretion confided to me by the Act of Congress approved July 13th 1861, entitled 'An Act to provide for the collection of duties on imports and for other purposes,' I do hereby license and permit such commercial intercourse, in all cases within the rules and regulations which have been or may be prescribed by the Secretary of the Treasury for the conducting and carrying on of the same, on the inland waters and ways of the United States."

Intercourse thus authorized and regulated, continued until March 31st 1863. On that day the President issued a further proclamation in regard to commercial intercourse between the loyal and disloyal states. The change made by that proclamation was to prohibit the unrestricted trade between the loyal states and the parts of disloyal states held and occupied by the national forces, which was authorized by the original proclamation. Such parts of the disloyal states were placed on the same footing as to trade as the residue and unoccupied parts of the disloyal states. The whole insurrectionary country was placed in the same condition, as to commercial intercourse with the loyal states. All were prohibited, except under license granted by the President "through the Secretary of the Treasury," and regula-

tions prescribed by the Secretary of the Treasury and approved by the President. But trade, in conformity with such license and regulations, was lawful in whatsoever part of the insurrectionary country it was carried on: *The Venice*, 2 Wall. 278.

The contract between the parties here was made after the proclamation of the President of March 31st 1863, and is therefore dependent, as to the validity of the trade agreed on, upon the condition of the law as it then was, by virtue of the Act of Congress and the proclamation last mentioned. The fact that the trade contemplated was between a loyal state and part of an insurrectionary state in the firm occupation of the national forces, does not seem to be of vital, if even of material consequence. The military occupation of the country, wherein the cotton was to be bought, does not appear to give the trade any lawful quality, other than it would have in a region of country not so occupied. It is thus apparent that there was a trade which might be lawfully carried on between inhabitants of the insurrectionary country and residents of the loyal states. Such trade the parties in this case agreed to engage in. It follows that their contract to engage in such trade was lawful..

It was not necessary to the legality of the trade that the party engaging in it should have a special license to himself by name, from the President himself, under his sign manual. A fair construction of the Act of Congress of July 13th 1861, does not exact that the trade which the President, under the regulations of the Secretary of the Treasury, was authorized to license, should be carried on by special and individual licenses, under his sign manual. And such was not the practice at the time. Nor was it the construction put upon the act at the time by the President and Secretary of the Treasury, who were charged by the act with the duty and authority to allow trade, that the license must be issued by the President, directly to the individual licensed, or by authority of the President granted by himself in each particular case, upon his discretion exercised in each particular case, as to the individual to whom the grant of license was to be made. The act authorizes the President in his discretion to license and allow the trade. Nothing in it exacts, as of necessity, that the discretion was not in any manner or to any extent delegable. On the contrary, the fact that the trade licensed was to be conducted in pursuance of regulations made by the Secretary of the Trea-

sury, indicates that it was not intended to restrict the trade to individual instances designated in each particular case by the President himself, but to allow a trade in some measure of more general character, in conformity with general regulations prescribed for its government. That was the construction put upon the act by the President and Secretary. And in conformity with such construction, persons embarked in the trade, and, indeed, whole communities, when brought within the dominion of the sovereign government by the military forces. A construction so made at the time, and by the chief functionaries charged with the execution of the Act of Congress, ought not now to be departed from, unless for very cogent reasons. Such reasons are not apparent to this court.

The President repeatedly exercised his discretion and granted license to trade. This was done by the order of February 28th 1862, already recited. It was further done by his order of March 31st 1863, accompanying and approving the regulations of that date, issued by the Secretary of the Treasury. The order or license recites "that it appears that a partial restoration of intercourse between the inhabitants of sundry places and sections heretofore declared in insurrection, and the citizens of the rest of the United States, will favorably affect the public interest; therefore the President, exercising the discretion and authority confided to him by the Act of July 13th 1861, hereby doth license and permit such commercial intercourse between the citizens of the loyal states and the inhabitants of the insurrectionary states, in the cases and under the restrictions described and expressed by the regulations of the Secretary of the Treasury, of even date with the order," to wit, March 31st 1863.

A license to trade with the enemy in time of war is said to be *stricti juris*. By this is meant, in its ordinary application, that the license granted to the person is to be construed strictly, as to the extent of the power granted to him by it; in respect to the manner in which he may exercise it; the objects in which he may trade; the person with whom he may deal; the times and circumstances in which he may exercise the power; the good faith on his part in his use of it; the inability to transfer it to others or enable others to trade under it, and many other circumstances touching the construction and exercise of the authority granted by the license. But we are not aware of any principle or autho-

rity which applies the like doctrine to the power of the sovereign or commander-in-chief of the army and navy, or to other public functionary, authorized by the public law or statutory law, to issue or grant license to trade with the enemy in time of war. In respect to the authority granted to the public functionary to authorize such trade, the ordinary principles of construction are properly applicable. And when the authorized officer of the government has exercised the power, and the citizens of the government have largely acted under the authority, confiding in the validity of its exercise, no good reason is obvious, but on the contrary, much reason is manifest why the citizens so confiding shall not have illegality imputed to their transactions under it.

It is not to be doubted that trade authorized and conducted under the license of the President, so granted, and in conformity with the regulations of the Secretary of the Treasury, is not to be deemed illegal.

Decree affirmed.

Supreme Court of North Carolina.

KANE AND WIFE *v.* McCARTHY AND WIFE ET AL.

Any woman, being a free white person, and an alien friend, married after the approval of the Act of February 10th 1855, to a man who was, at the time of such marriage, a naturalized citizen of the United States, becomes, by such marriage, *ipso facto*, herself a citizen of the United States, and capable of inheriting real estate, although she resided in a foreign country at the time of her said marriage, and has continued her actual residence there ever since.

And any alien woman answering the above description, and married before the approval of the said act, to an alien husband, who has been subsequently naturalized, becomes by his naturalization, *ipso facto*, herself a citizen of the United States, and capable of inheriting real estate.

It is the status of being married to—being the wife of—a citizen, which makes the alien woman a citizen of the United States.

THIS was an action for the partition of certain real estate in the city of Raleigh.

The facts of the case were as follows: John Kane, who was a native of Ireland, but a naturalized citizen of the United States, resident in the city of Raleigh, being seised of certain real estate in said city, died intestate May 20th 1863. The decedent left no lineal descendants. At the date of his decease all his collateral

relations were aliens, who could not inherit according to the law of North Carolina, except the *femes coverts* and infants, parties to the suit, who all claimed to be citizens of the United States, and therefore capable of inheriting.

The plaintiff Martha Kane was a sister of John Kane, a free white woman, and a native of Ireland, where she had always resided until after the said John Kane's death, and she was never in the United States, until she came here in 1867 to institute this action; but on the 28th day of November 1857, being of full age, she married the plaintiff Thomas Kane, her cousin, who was, at the date of said marriage, a naturalized citizen of the United States, and had resided therein from 1848 to 1857, when he returned to Ireland, after having been lawfully naturalized in the state of New York in October 1855.

Both the plaintiffs, after their marriage, remained in Ireland until after John Kane's death, having, however, always the intention of eventually removing to the United States; and in 1867, the plaintiff Martha came to this country to institute this action, leaving her husband still in Ireland.

The defendant Mary McCarthy was also a sister of John Kane, a free white woman and a native of Ireland: she immigrated into the United States during her infancy, in the year 1850, and continued to reside therein ever after. In May 1851 she intermarried with the defendant Dennis McCarthy, an Irishman, who landed in the United States on the 12th of March 1850, and has resided here ever since, having been lawfully naturalized in the state of New Jersey in October 1856.

The infant defendants, Thomas Patrick McCarthy and Isabella McCarthy, were the children of Dennis and Mary McCarthy, were both born in the state of New Jersey, and have resided there ever since their birth; and, since 1865, these infants had been in the pernancy of the rents of the real estate described in the pleadings.

The plaintiffs filed their complaint in the Superior Court of Wake county, setting forth the above facts, claiming one-half of the real estate, in right of the plaintiff Martha, as one of the heirs of John Kane, admitting that the infant defendants were entitled to the other half, as the other heirs of the said John Kane, alleging further, that the said infant defendants claimed the whole of said real estate, and that the defendants Dennis and

Mary McCarthy, in right of said Mary, also set up an *unfounded* claim to the whole of the said real estate, and demanded judgment of partition and an account of the rents and profits.

The defendants demurred, "because it appears upon the face of the complaint, that the facts therein stated are not sufficient to constitute a cause of action, and to entitle the plaintiffs to the judgment which they demand."

The court gave judgment on the demurrer for the defendants, and thereupon the plaintiffs appealed to the Supreme Court.

Ed. Graham Haywood, for plaintiffs.—1st. By virtue of the 2d section of the Act of Congress of the 10th of February 1855, Martha Kane was, at the time of descent cast, a citizen of the United States, and capable of inheriting to her brother John.

It is admitted that Martha Kane is a woman who has married a naturalized citizen of the United States since the act, the only question is, was she, at the date of her marriage, "*a woman who might lawfully be naturalized under the existing laws.*" The auxiliary verb "*may*," in all its forms, has a *potential* meaning; it is used to express, not what *is*, but what *is possible;* and this expression, according to its natural interpretation, is equivalent to, any woman for whom, by the laws extant in 1855, naturalization was or is possible; in other words, any woman who, by the laws in force in 1855, was or is capable of becoming a citizen of the United States through the process of naturalization as then regulated by law.

2d. To ascertain who might lawfully be naturalized under the existing laws, we refer to the Naturalization Act of 1802, and find that "any alien being a free white person, provided that he or she is not an alien enemy," is capable of becoming a citizen of the United States by the process of naturalization: 10 Stats. at Large, ch. 71, p. 604; 1 Bright. Dig. of Laws, tit. *Citizenship*, p. 132, and tit. *Alien*, p. 73; 2 Kent's Com. (ed. of 1867, by G. F. Comstock), p. 15 n., and p. 36; 1 Scrib. on Dower, from p. 174 to p. 176, and pp. 144 and 147; 2 Am. Law Reg. (O. S.) p. 193; *Burton* v. *Burton*, 3 Am. Law Reg. (N. S.) p. 425; 26 How. Prac. Rep. p. 474; *Greer* v. *Sankston*, 26 How. Prac. Rep. p. 471; *Ludlam* v. *Ludlam*, 31 Barb. (N. Y.) p. 486; affirmed in the Court of Appeals, 26 N. Y. Rep.; also 3 Am. Law Reg. (N. S.) pp. 595 and 599.

3d. The Act of 1855 was not intended to provide a new process of naturalization for alien women and children, as is apparent from its title and whole purview and meaning; it was enacted to define and regulate the legal status as to citizenship of foreign-born wives and children of United States citizens, and to identify them in citizenship with the father and husband, without any process of naturalization. Its main object was to dispense with the process of naturalization in cases coming within its operation.

4th. To allow the words "who might lawfully be naturalized under the existing laws," the effect of compelling an alien woman to use the whole process of naturalization, except the final step of admission by a competent court of record, before she becomes a citizen by reason of the fact that she is the wife of a citizen of the United States, is to permit this single sentence to defeat the whole policy, purpose, and scope of the act.

W. H. Battle, for infant defendants.—By the laws of the United States, the following are indispensable requisites to naturalization. 1st. Five years' residence; 2d. Proof of good character; 3d. Renouncing title of nobility; 4th. Not being an alien enemy. Martha Kane was a native of Ireland and had always resided there; what was her character does not appear, the only requisite she had was that of being a white woman. Is that alone sufficient?

Residence here was a *sine qua non* to being naturalized. Act of 1802 required five years' residence, proof of good moral character, and attachment to the Constitution. Act of March 1813 required five years' residence. Act of March 1816 required the same. Act of May 1824 required five years' residence even for minors. Act of 1828 required five years' continued residence and particular proof of it. Act of 1848 only strikes out the clause, "without being at any time within the said five years out of the territory of the United States," which was in the Act of 1813, still leaving a five years' residence to be necessary. It will thus be seen that all the acts insist upon residence as an indispensable requisite to naturalization, without repeating the clause which requires proof of character.

An alien *feme covert* may be naturalized: see *Ex parte Pic*, 1 Cranch, Cir. Co. Rep. 372; and she must be naturalized before she can claim dower: see 1 Cruise Dig., tit. *Dower*, chap.

1, sect. 29 and 30; Smith on Real and Per. Property, p. 296; *Paul* v. *Ward*, 4 Dev. 247.

Compare our act with the 7 & 8 Vict. ch. 66, sect. 16, and it will be seen that ours is a copy of it, with the additional words, "who might lawfully be naturalized under the existing laws." The British statute reads thus: "Any woman, married, or who shall be married to a natural born subject, or person naturalized, shall be deemed and taken to be herself naturalized, and have all the rights and privileges of a natural born subject:" see *Regina* v. *Manning*, 66 Eng. Com. Law Rep. p. 886.

S. F. Phillips and *R. H. Battle, Jr.*, for the adult defendants.—In 1863, at the death of John Kane, Mary McCarthy his sister, being a person who, under existing laws, *might be naturalized*, and being the wife of a citizen of the United States, was herself a citizen, and so is an heir of John Kane.

If she be an heir, she is so to the exclusion of her children, the defendants Francis P. and Isabella McCarthy.

In 1863, at John Kane's death, his sister Martha Kane, though the wife of a citizen of the United States, was not a woman who *might be naturalized*, and could not be John Kane's heir.

The words "*who might be naturalized*" mean one *who is in a condition to be naturalized* under existing laws, and the intent of the act must have been to dispense with the usual forms attending the process of naturalization in case of marriage to a citizen. In such case, omission by the wife to go through the *forms* of naturalization (and *naturalization* of a woman by the courts is of rare occurrence) is cured by her being married to a citizen. That the woman should be a resident, and subject to the jurisdiction of the courts of the United States, must be required.

As to the question of *residence*, the policy of the legislation of the United States, is apparent by reference to the words of Mr. Webster's bill of 1848, in which the words "and shall *continue to reside* therein," show that residence in the country was presumed as a necessity of citizenship.

Who might be naturalized, cannot be a periphrasis for *free white woman*. Reference is made in the 1st section of the act to the Act of 1802, in which the expression *free white person* is used six times.

The Act of 1802 was before the draftsman, and there was no

reason for the abandonment of an expression of certain meaning for one intended to be synonymous but of doubtful import. *Who might be* was used deliberately, and does not mean *who may be.*

Burton v. *Burton* is an authority against the plaintiff, though the reasons given for the decision were not well considered, and the *dicta* are bad as well as gratuitous.

As to the effect of change of words in statutes, see Dwarris on Statutes, p. 707.

The opinion of the court was delivered by

PEARSON, C. J.—The right of the feme plaintiff, Martha Kane, to take by descent, as one of the heirs at law of John Kane, depends upon the construction of the 2d section of the Act of February 10th 1855.

The wording of this section is very precise, and, as it seems to us, its meaning is too clear to leave much room for construction, or to call for much discussion.

What description of woman might lawfully be naturalized, under the existing laws? That depends on the Act of 1802: "Any alien, being a free white person, may be admitted to become a citizen of the United States on the following conditions, and not otherwise:" sec. 1. And there is a proviso that the person must not be an alien enemy. Martha Kane is a free white woman, a native of Ireland, and was not an alien enemy, therefore she might lawfully have been naturalized under the existing laws, and answers the description required by the section under consideration; she was married to a citizen of the United States when the descent was cast, and was then herself a citizen, by force of the Act of 1855, and takes as one of the heirs of her brother.

But it is said that Martha Kane had no residence in the United States before or at the time of the descent cast. That is true; and it might be added that she never filed a declaration of intention, never took an oath to support the Constitution of the United States, or renounced her allegiance to the Queen of Great Britain; and there was no proof of her being a woman of good moral character, attached to the principles of the Constitution of the United States.

The reply is,—these are conditions which persons applying for naturalization *under the Act of* 1802, are required to comply with.

But there are no such conditions imposed by the Act of 1855; it only requires that the woman shall be one of such a description as might be lawfully naturalized under the existing laws, and if she answers the description, the very object of the act was to dispense with all these requirements, and make her a citizen by the mere fact of her being married to a citizen of the United States. In other words, the wife of every citizen of the United States "is to be deemed and taken to be a citizen," so that if a citizen marries an alien woman residing here, *ipso facto* she is a citizen also, without going through the forms required by the Act of 1802; or, if he marries an alien woman residing in Ireland, *ipso facto* she is a citizen, and should he die without returning to the United States, she will take dower; or, if he settles his land on her by will or otherwise, she will take and hold. The policy of the Act of 1855 is to identify the wife with the husband in regard to *citizenship*, and thus to carry out the principles of the common law as to the relation of "husband and wife."

Does the conclusion need confirmation? It is furnished by the 1st section; the *status* of the father is made that of the child, and on its birth, *ipso facto*, it is a citizen of the United States, without residence, declaration of intention, or oath to support the Constitution, all being dispensed with, and the only limitation is, that if the child never comes to reside in the United States, the right of citizenship shall not descend to his children.

And this section puts a limitation upon the descent of citizenship to the children of a wife who never comes to reside in the United States; so if her citizen husband dies, and she marries an alien, her child by the second husband would not be a citizen, for it is confined to children whose *fathers* are citizens.

On the argument, our attention was called to 7 & 8 Vict.: "Any woman, married or who shall be married to a natural born subject or person naturalized, shall be deemed and taken to be herself naturalized, and have all the rights and privileges of a natural-born subject." It is clear that the Act of 1855 was taken from this statute, and it is then asked, why change the wording, and, instead of "any woman," use the paraphrase "any woman who might lawfully be naturalized under the existing laws," if the operation of the act was to be as broad and sweeping as that of Victoria?

It is not seen how this can have much effect upon the argu-

ment, but the solution is easy. The Act of 1802 does not make *any woman* capable of being naturalized, so it was necessary to make some change by adding the words "free *white* woman," or some equivalent expression, and the history of parties in 1855 fully explains why this equivalent expression was adopted, instead of "free *white* woman;" for at that time an angry contest was going on in reference to the words "all men are born free and equal," and a formidable party took the ground that the Act of 1802 was in violation of the Declaration of Independence, in so far as it attempted to exclude from citizenship all who were not "free *white* persons." If the words "free white" had been left out, the bill would have met with opposition from the South, and if these words had been expressed, it would have met with opposition from the North, so the reason for adopting an expression which leaves that question open is obvious.

Having settled the right of Martha, the right of her sister Mary can be settled in few words.

Mary was a resident of the United States at the time of her marriage; in this, seemingly, she has the advantage of Martha; but her husband was not a citizen of the United States at the time of her marriage; in this, seemingly, Martha has the advantage of her, but in fact they both stand on the same footing, for it is not the ceremony of marriage, or its time or place, but it is the fact of being "married to," that is, being the wife of a citizen, that makes the woman a citizen. The circumstance that her husband was not a citizen at the time of the marriage is wholly immaterial, for he became a citizen afterwards; *ipso facto* she being a free white woman married to a citizen, comes within the description and the very words of the Act of Congress, and is deemed and taken to be a citizen; for it is the *status* of being married to—being the wife of a citizen, that makes her one.

It can in no possible view make any difference whether the marriage ceremony is performed first and then the husband becomes a citizen, or whether he becomes a citizen first, and the marriage afterwards takes place. Wherever the two events concur and come together, she is a woman married to a citizen.

The thing seems to us too plain to admit of discussion—it is like trying to prove that two added to two make four.

Mary is entitled to the other moiety, and the defendants, her two children, are excluded.

There is error, judgment reversed and judgment that plaintiff recover one undivided moiety of the lands mentioned in the pleadings, and that partition be made between the plaintiff Martha and the defendant Mary.

To this end, it is referred to the clerk to inquire whether a sale will be necessary for the purpose of partition; and an account will be taken of the rents and profits; the plaintiff will have judgment for costs.

Burton v. *Burton*, 26 Howard's Practice Rep. 474; *Ludlam* v. *Ludlam*, 31 Barb. 487, cited on the argument, received due consideration by the court.

Since the foregoing case was decided the Supreme Court of the United States, in *Kelly* v. *Owen*, have construed the same Act of Congress. We have not seen the full opinion (which will be published in 7 Wallace); but, judging from the syllabus, furnished us by the Reporter (ante, p. 444), the court seems to take the same view of the act as the court in the foregoing case.

J. T. M.

Supreme Court of Alabama.

J. DUBOSE BIBB *v.* EVELYN POPE.

The husband and wife cannot enter into a mortgage of her statutory separate estate for the purpose of subjecting it to sale for the payment of the husband's debts; and if they do, a court of chancery will not permit the mortgage to be enforced by sale of the wife's separate estate, if she objects to it.

THE opinion of the court was delivered by

PETERS, J.—On the 5th of April 1866, Augustus Pope, the husband of Mrs. Evelyn Pope, appellee, borrowed of J. Dubose Bibb, appellant, the sum of $10,000, for which he gave his bill of exchange for $12,400, payable eight months after date, to order of said Bibb. On the same day said Augustus Pope executed and delivered to said Bibb a certain conveyance in writing, in the form of a mortgage, whereby he conveyed to Bibb certain lands therein named, which belonged to himself, and a lot numbered 57 in the city of Montgomery in this state, which was the separate property of his wife, said Evelyn Pope. This mortgage contained a power to sell the land contained therein, in the event that Pope failed to pay said bill of exchange at its maturity. Mrs. Pope united with her husband in this mortgage, and the same is attested by two

witnesses. At the maturity of the bill of exchange Pope failed to pay it, and Bibb then proceeded to advertise a sale of the mortgaged property, for the purpose of selling the same for payment of his debt against said Augustus Pope; and included in said advertisement the lot belonging to Mrs. Pope, as her separate estate. Thereupon Mrs. Pope by her next friend filed her bill in the Chancery Court of Montgomery county aforesaid against said Bibb, and said Augustus Pope her husband, for the purpose of enjoining and preventing said proposed sale of her said lot No. 57. An injunction was granted her, and upon the final hearing it was made perpetual. The bill was filed on the 23d day of January 1867. It appears from the bill and proofs, that B. N. Wilkerson and his wife Elizabeth gave the lot in controversy to Mrs. Pope by deed, on the 10th day of August 1860, to have and to hold the same to her, "her heirs and assigns, to her use and behoof for ever." Upon the hearing, the Chancellor sustained the bill and perpetually enjoined Bibb from selling said lot No. 57 as the separate estate of Mrs. Pope, under said mortgage, and taxed Bibb with the costs. From this decree Bibb appeals to this court.

The only question discussed at the bar was, whether Mrs. Pope was bound by said mortgage, and whether her statutory separate estate was liable to be sold under it, to pay her husband's debt due by said bill of exchange to said Bibb. This question has not heretofore been settled by any decision of this court. In discussing it, the court cannot close its eyes to the fact that the wife is under the *power* of the husband, and often acts, when he chooses to invoke her aid, under an influence but little less potent than actual duress, nor can it ignore the further fact that the law, under the common-law system, has treated the wife in some respects as the servant of the husband, subject to his control, even to chastisement by stripes "in case of any gross misbehavior:" 1 Bl. Com. 444, 445; 2 Kent Com. 181. She has been placed very much upon the footing of a child during its minority. She has had no voice in any one of the great departments of the government; no voice at the ballot-box; no voice on the jury. She rarely deals with the husband, nor, where he is interested, upon equal terms with him. These circumstances have rendered her, of late years, the peculiar object of legislative solicitude and protection. The law-making wisdom of the state has seen and felt

her need of greater protection than the common law afforded, and has devised, under various titles, "laws for the protection of the rights of married women." Thus far such laws have recommended themselves so strongly to public favor, that, to secure them from repeal and fluctuation, they have been in many instances incorporated into the fundamental law of the state. And we think it safe to say that the declared and manifest purpose of such enactments furnishes a just rule for their interpretation. They were made to avoid the known insecurity to which the estates of married women are exposed, from the improvidence or maladministration of the husband, who necessarily exercises so large a control over the wife, and through her over her estate.

The Code of 1853, which is copied into the Revised Code of this state, and which latter code, with certain modifications, is now the law that must govern the judgments of this tribunal, declares that "all the property of the wife, held by her previous to the marriage, or which she may become entitled to after the marriage *in any manner*, is the separate estate of the wife, *and is not subject to the payment of the debts of the husband.*" And another section of the same law vests in the husband, as the trustee of the wife, her separate estate; and gives him the control and disposition of the "*rents, income, and profits thereof*, but such rents, income, and property *are not subject* to the *payment of the debts of the husband:*" Rev. Code, §§ 2371, 2372; *Patterson* v. *Flanagan*, 37 Ala. 513.

The bill in this case is filed by the wife, Mrs. Pope, to prevent the sale of her separate estate for the payment of the debt of her husband, Augustus Pope—a thing which the statute declares shall not be done. If, then, this sale is permitted, the whole purpose of the law, so far as it protects the wife's separate estate, will be defeated, for when the principle is once admitted that this may be done, methods and ways will soon be discovered to carry it into unlimited effect. This cannot be allowed. It would be a violation of law by indirection; and what it is illegal to do directly, is also illegal if done indirectly. For it is the *thing* that is forbidden, and not the *manner* of doing it. In whatever form, then, whether of law or in equity, this is attempted, the power to do it is denied by the express words of the statute, by the whole scope of its intent, and by the character of the evil sought to be remedied.

It was very earnestly contended at the bar, by the learned counsel for the appellant, that the wife had the power to sell, and therefore she had the power to mortgage her estate for the payment of the husband's debts: because the power to sell was the greater power; and as the greater always contained the less, the right to mortgage, because it was a *form* of sale, followed the power to sell as necessary consequence: *Omne major continet in se minus*: Broom's Max. 129; 2 Kent 553, 554; Hamilton's Log. 208. This is an admitted rule of logic and also of law, but it is not strictly applicable in this case. The distinction is lost sight of that the wife can neither sell nor mortgage her separate estate under the statute, for the payment of the husband's debts. This would defeat the purpose and words of the act of itself. It would tear away from the wife its whole protective force, whenever the husband chose to avail himself of her means. She is much under the influence of the affections, and shrewd and unscrupulous men know how to take advantage of this weakness, often to her beggary and ruin, and it is this that the law interposes to prevent. In *Warfield* v. *Ravesies and Wife*, this court have said that "property held by the wife, either under the Act of 1850 or under the Code, cannot be said to be the separate estate of the wife *in its broadest sense*:" 38 Ala. 523. Yet it is in this sense that the appellant presses his rights on the court. The sale that the wife and her husband are permitted to make without the aid of a court of chancery is only such a sale as is mentioned in the act. That is, a sale for the purpose of reinvesting the proceeds in other property, which is also the separate estate of the wife, or for the support of the family. A mortgage within these limits would be almost a futile act; and such is not the mortgage here insisted on: Rev. Code, §§ 2373, 2374, 2376; *Alexander* v. *Saulsbury*, 37 Ala. 375; *Warfield* v. *Ravesies and Wife*, 38 Id. 518.

It is further urged against the validity of this mortgage that it is a fraud upon Mrs. Pope, and void for that reason. Her husband is her trustee; the mortgage could not have been accomplished without his concurrence; that its execution prejudiced the trust estate for the benefit of the trustee and not for her benefit; and that if it is enforced, it will utterly ruin the trust estate solely for the trustee's individual profit. Bibb knew this, or was bound to know it, and cannot be excused if he did not. And to permit him to take advantage of it would be to aid him and the trustee

to profit by their own injurious acts: Broom's Max. 215, 216 And although the transaction might not be strictly and technically a fraud, it has the same effect. And upon the same principle that the greater contains the less, it may be said with equal truth that, things equal to the same thing are equal to each other. So that whatever has the effect of a fraud in the management of a trust must be treated as a fraud: Rev. Code, § 2372; *Johnson* v. *Thweatt*, 18 Ala. 741; *Boney* v. *Hollingsworth*, 23 Id. 690; *Trippe* v. *Trippe*, 29 Id. 637; *Charles* v. *Du Bose*, Id. 367; 1 Story's Eq., § 322; 1 Id. 323.

Decree affirmed.

Supreme Court of Michigan.

JAMES FOSTER v. THE PEOPLE.

An accomplice who has given testimony criminating himself as well as his co-defendant, on whose trial he testifies, cannot refuse to answer fully on cross-examination concerning the entire transaction of which he has undertaken to give an account, and in which he had shown himself guilty.

Evidence that a person charged with larceny had previously attempted to purchase a chattel similar to that stolen, has no tendency to disprove theft, and is not admissible for that purpose.

THE opinion of the court was delivered by

CAMPBELL, J.—The respondent was informed against jointly with one William McCoy, in the Circuit Court for the county of Macomb, for the larceny of a horse and some other articles. Foster was tried separately, and the other defendant, McCoy, was used by the People as a witness against him.

McCoy proved facts tending to show the guilt of Foster, and showing also his own guilt in receiving the horse in Detroit and taking him to Toledo, where the witness was arrested with the stolen property. Upon cross-examination he admitted that he had made an affidavit for continuance, in which he swore that, as he had been advised by counsel, and believed, he had a good defence upon the merits. Counsel for Foster then asked what that defence was. The counsel for the People objected to the question, on the ground that a person accused of crime could not, while a trial was pending, be compelled to disclose his defence. The court overruled this objection, and then the witness declined

to answer. The record does not show on what ground the witness declined. The court refused to direct him to answer. Whether the witness had or had not such a privilege, it was not an objection which any one but the witness himself could raise upon the trial, and probably the court overruled it, when made by the prosecutor, on this ground, inasmuch as when made by the witness it was allowed. Privilege from crimination or the like is no ground for refusing to allow questions to be put, if not objected to by the party privileged: 1 Greenl. Ev. § 451; Roscoe Cr. Ev. p. 174; note to *Thomas* v. *Newton*, 1 Moody & Malk. 48; *Commonwealth* v. *Shaw*, 4 Cush. R. 594; *Southard* v. *Redford*, 6 Conn. 254.

It cannot be reasonably claimed that the question was too irrelevant to be answered, even if such an objection could be taken by a witness. Any defence which he may have had against the charge could only have related to matters directly bearing upon what he had already testified to, because the charge was against both him and Foster, and anything throwing light upon any transaction connected with the history of the theft, from its inception to the arrest of the property in his hands, was receivable in evidence on the trial, and was properly received by the court. If excluded at all, it must be on some ground of privilege which justified the witness in refusing to disclose the facts referred to.

Nor can it be regarded as unimportant to enable the jury to appreciate the real character of the witness as a reliable narrator. It has always been understood that the testimony of accomplices against a prisoner should be scanned with jealousy; and in many cases it has been intimated that no conviction could properly be had upon that alone. We do not hold to this extreme doctrine, but leave the credit of such persons to the jury; yet the quality of such testimony can never be regarded as entirely separated from the character which is indicated by their crimes; and if the position they occupy indicates moral turpitude, there is a necessity for more thorough cross-examination, and nothing ought to be shut out which can sensibly aid in explaining their credibility, unless there is some fixed rule of law that excludes it.

The witness not having given any reason for refusing to answer, we can only infer what reasons he might have had; and the only ones that have been suggested from any quarter are, 1st. His

supposed right to keep to himself his communications with counsel relative to his defence; and, 2dly. His right to avoid criminating himself in any way.

It has been suggested that the crimination which might be created by an answer to the question would go beyond any liability upon the larceny and apply on a charge of perjury, which might lie if he swore to facts making him responsible, and had before made an affidavit contradicting those facts. If any necessary contradiction was created by the affidavit, it is difficult to see how he could be put in any worse condition by explaining to what it referred. But it is unnecessary to consider that point here, because no such contradiction appeared. The affidavit that he had a defence on the merits to this information agrees well enough with his testimony, because, while proving conclusively his guilt, he has, so far as his testimony is concerned, disproved any liability under this information, which charged an offence in Macomb county, while he swears to acts none of which were acknowledged to have been committed by him or by his procurement in that county. According to his showing, he could be held in Wayne and in Monroe, but not in Macomb.

The question therefore narrows itself to an inquiry whether, after undertaking voluntarily to explain the transactions connected with the larceny and disposition of the property involved in the charge on trial, and after answering fully the direct questioning of the prosecution, and unequivocally criminating himself to the extent of complete legal guilt of larceny of that property, he can then refuse to answer further and be protected against further disclosures relating to the same transactions.

No principle is better settled than that no inference can be permitted against a witness because he asserts his privilege: *Carne* v. *Litchfield*, 2 Mich. R. 340; *Rose* v. *Blakemore*, Ryan & Moody 382; Lord ELDON in *Lloyd* v. *Passingham*, 16 Ves. R. 64; *Knowles* v. *People*, 15 Mich. R. 409. This doctrine is necessary in order to make the privilege of any value. But the necessity of making the privilege effectual renders it equally necessary to take care that where such protection would lead to absurd or unreasonable consequence, it shall not be allowed.

It would certainly lead to most startling results if an accomplice, who had made out a clear showing of a prisoner's guilt, and has, in doing so, criminated himself to an equal degree, could

refuse to have his veracity or fairness, or bias or corruption tested by a cross-examination, and yet be allowed to stand before court and jury on the same footing with any other witness who has been perfectly candid, but who may have been convicted of a similar felony. It is perfectly evident that where a witness who has undertaken to give a full account of a transaction, and has not spared himself from conclusive accusation, then turns round and refuses to answer further, his motive must be something more than to save himself from the criminal exposure; and it is of great importance to learn why such a course is adopted. If in those cases where cross-examination is most desirable, to test the credit of a man who is seeking to save his own liberty by swearing away that of another, it can be completely prevented at the option of the witness himself; it would be difficult to justify the rule which allows co-defendant to be used by the prosecution at all, when they cannot be received for the defence. I cannot conceive that the law will tolerate such a state of things. When a man has voluntarily admitted his guilt, he has done all that he can to criminate himself; and his protection from further disclosure on the same subject is no protection whatever, because it cannot undo what makes the whole mischief.

The cases which apply to ordinary witnesses, who do not stand properly on the same footing with accomplices, do not in any way sanction such a stretch of privilege. It has been decided, and is the received doctrine, that a witness is entitled to decline answering not only questions which directly criminate him, but also any questions which may apply to facts forming links in the chain of criminating evidence. And where he has not actually admitted criminating facts, the witness may unquestionably stop short at any point, and determine that he will go no further in that direction. He may judge that his protection does not require him to avoid replying concerning some facts, when as to others the tendency is or seems to him more direct and incriminating. Yet even this doctrine, upon the particular facts of the case, although the witness refused to answer the only question which applied directly to the guilt involved, was held in so much doubt in *Regina* v. *Gurbett*, Dennison's Cr. Cas. 236, s. c. 2 Car. & Kir. 474, that the Court of Exchequer Chamber was unable to agree on the first argument, and on the second argument, after some changes in the

Bench, the three Chiefs of the Courts, DENMAN, WILDE and POLLOCK, and PATTESON, COLERIDGE and ERLE, JJ., dissented from the other nine, and held the witness had gone too far to claim any further privilege. He had undoubtedly gone very far, but, nevertheless, he had not convicted himself, and the decision, while right in its principles, was also correct, as it would seem, upon the facts. As no opinions are reported, we cannot ascertain the precise views of the judges, who do not seem to have agreed as to how far the witness had claimed his privilege. But the rule which allows a witness to refuse answering questions not directly pointing to guilt, rests solely on the doctrine that, as in most cases the crimination would be made out by a series of circumstances, any one of them may have such a tendency to aid in reaching the result that an answer concerning it may supply means of conviction by aiding the other proofs which it indicates or supplements on behalf of the prosecution. The right to decline answering as to these minor facts is merely accessory to the right to decline answering to the entire criminating charge, and can be of no manner of use when that is once admitted, and must be regarded as waived when the objection to answering to the complete offence is waived. The law does not endeavor to preserve any vain privileges; and such a privilege as would allow a witness to answer a principal criminating question, and refuse to answer as to its incidents, would be worse than vain; for, while it could not help the witness, it must inevitably injure the party, who is thus deprived of the power of cross-examination to test the credibility of a person who may, by avoiding it, indulge his vindictiveness or corrupt passions with impunity. The distinction between the cases where a witness has or has not furnished sufficient evidence to criminate himself, is clearly recognised in *Amherst* v. *Hollis*, 9 N. H. 107, and in *Coburn* v. *Odell*, 10 Foster 540, as well as incidentally in numerous other cases, which hold that when he had once made a decisive disclosure his privilege ceased. And the further consideration is also recognised that a witness has no right, under pretence of a claim of privilege, to prejudice a party by a one-sided or garbled narrative.

As Mr. Phillips very neatly expresses it: "A witness may waive his privilege and answer at his peril. From the nature of the right it may be inferred that he will be at liberty to answer,

or to refuse to answer, any questions at his discretion; and that his consenting to answer some questions ought not to bar his right to demur to others. On the other hand, it is only reasonable that he should not be allowed, by any arbitrary use of his privilege, to make a partial statement of facts to the prejudice of either party:" 2 Phill. Ev. (Edw. ed.) 935.

Accordingly, where a witness has voluntarily answered as to material criminating facts, it is held with uniformity that he cannot then stop short and refuse further explanation, but must disclose fully what he had attempted to relate. This view is adopted by the text writers, and is very well explained in several of the authorities where the principle is laid down and enforced: 1 Starkie Ev. 206, 19th Am. ed.; Roscoe's Cr. Ev. 174; 1 Greenl. Ev. § 451; 2 Phill. Ev. 935; 2 Russ. Cr. 931; *Coburn* v. *Odell*, 10 Foster 540; *State* v. *K.*, 4 N. H. 562; *State* v. *Foster*, 3 Foster 348; *Foster* v. *Pierce*, 11 Cush. 437; *Brown* v. *Brown*, 5 Mass. 320; *Amherst* v. *Hollis*, 9 N. H. 107; *Low* v. *Mitchell*, 18 Me. 272; *Chamberlain* v. *Willson*, 12 Vt. 491; *People* v. *Lohman*, 2 Barb. 216; *Norfolk* v. *Gaylord*, 28 Conn. 309.

In *Foster* v. *Pierce*, 11 Cush. R. 437, it is held that where a witness knows in the beginning that his testimony in the case must expose him to a criminal charge, he must claim his privilege in the outset or waive it altogether. And as applied to cases in which that is the gist of the inquiry, this rule appears to be necessary and just to prevent partial and unfair statements. It is probably not designed to apply to any others.

When accomplices are allowed to testify for the purpose of furnishing evidence against a prisoner, they not only know that they are expected to criminate themselves, but they do it with the prospect of an advantage, which, if not absolutely promised, is substantially pledged to them if they make full disclosures. If they see fit to furnish criminating proof, there is every reason to compel them to submit to the fullest and most searching inquiry. They expressly waive their privilege by giving such proof, for they could not be sworn at all without their consent while under a joint indictment; and if not indicted they could still refuse to furnish evidence of joint misconduct. But there is neither reason nor show of authority which can in any case allow to them any privilege whatever when they have gone so far already as to any

matters in which they and the prisoner on trial have been connected. As to separate and purely private transactions, not connected with the matters under inquiry, they stand like any other witnesses, because they are not, as to those, accomplices at all, and no protection is pledged to them on such charges: 2 Russ. Cr. 927. Even on the principles applied to ordinary witnesses they would not be protected, as we have seen, after making any conclusive disclosure. They come upon the stand for no other purpose, and they have never been allowed, under such circumstances, to stop short of a full disclosure. And no privilege is recognised as then belonging to them: 2 Phill. Ev. (Edw. ed.) 930 note; 2 Russ. Cr. 927; *Commonwealth* v. *Price*, 10 Gray's R. 472; *State* v. *Coudry*, 5 Jones's L. R. 418; *Brown* v. *Brown*, 5 Mass. R. 320; 2 Phill. Ev. 936.

The witness in the present case ought not to have been permitted to decline answering the question put to him touching the character of his defence, as alluded to in his affidavit for continuance.

The other error assigned was, that the court ought not to have refused to allow respondent to prove that, within the previous six months, and before the time of the theft, he had applied to the witness Collyer to purchase a horse. This was to corroborate a defence set up that respondent purchased the horse alleged to have been stolen.

We cannot perceive how a desire or offer to purchase a horse tends to prove that a person did not subsequently steal one. Even the most inveterate thieves must sometimes purchase articles; and the fact that they do so, would not at all interfere with their misconduct as to others. The evidence was clearly inadmissible, and its rejection was proper.

But for the other error there should be a new trial.

The other justices concurred.